IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 5TH JANUARY 2007 / 15TH PAUSHA 1928

WP(C).No. 34551 of 2006(L)

PETITIONER:

GEETHA.P.I.,
UPPER PRIMARY SCHOOL ASSISTANT,
R.R.UPPER PRIMARY SCHOOL,ULLANNOOR,
RESIDING AT "UGMA",KAIPUZHA,
KULANADA (PO),PATHANAMTHITTA DISTRICT.

BY ADV. SRI.MILLU DANDAPANI

RESPONDENTS:

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1. STATE OF KERALA,
REP.BY SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC INSTRUCTION,
O/O.THE DIRECTOR OF PUBLIC INSTRUCTION,
THIRUVANANTHAPURAM.

3. THE DEPUTY DIRECTOR (EDUCATION),
O/O.THE DEPUTY DIRECTOR OFFICE,
(EDN.),PATHANAMTHITTA.

4. THE DISTRICT EDUCATIONAL OFFICER,
O/O.THE DISTRICT EDUCATIONAL OFFICER,
THIRUVALLA.

5. THE ASSISTANT EDUCATIONAL OFFICER,
O/O.THE ASSISTANT EDUCATIONAL OFFICER,
ARANMULA.

6. THE MANAGER,
R.R.UPPER PRIMARY SCHOOL,
ULLANNOOR.

7. SMT.RADHAMANI AMMA.P.,
W/O.C.S.PANICKER,KUMBAZHETHU HOUSE,
KIDANGANNOOR POST,MEZHUVELI,PATHANAMTHITTA.
(UPPER PRIMARY SCHOOL ASSISTANT,
R.R.UPPER PRIMARY SCHOOL,ULLANNOOR).

R1 TO R5 BY GOVT. PLEADER (SHRI A.J. VARGHESE)

BY ADV. SRI.S.SUBHASH CHAND

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05/01/2007 ALONG WITH WPC NO. 338 OF 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. M. JOSEPH, J.

W.P.C. NOS. 34551 OF 2006 L

&

W.P.(C). NO. 338 OF 2007 M

Dated this the 5th January, 2007

JUDGMENT

Both these Writ Petitions being connected, they are disposed of by a common Judgment.

2. W.P.(C). No.34551/06 is filed by an under graduate teacher. She is working as UPSA. Her case, in brief, is as follows:

She is working as Teacher-In-Charge of the 6th respondent's School. She joined the 6th respondent's School on 6.12.1983. She is a TTC holder and passed Pre-Degree and Account Test. She had approved service prior to her regular appointment. The 7th respondent joined service on 2.6.1986. Seventh respondent is a Graduate and she also possesses B.Ed. and Account Test (Lower). Her service was approved. Petitioner is ranked at Sl. No.2 in Ext.P2 seniority list. Seventh respondent is ranked below her, at Sl. No.3. A vacancy of HM

arose on 1.4.2004. It was filled up by appointment of the person in rank No.1, Shri Francis M. Cherian who continued till retirement on 31.3.2005. In the resultant vacancy, petitioner was appointed with effect from 1.4.2005. This appointment was not approved by the Educational Authority and though she has preferred an Appeal, it was rejected on the ground that the seventh respondent is entitled to be promoted under Rule 45 of Chapter XIV A KER. The 7th respondent approached this Court and this Court directed the matter to be considered. By Ext.P3 Order, it was found that the 7th respondent is entitled to be promoted as HM, noting that the 7th respondent is a Graduate Teacher with requisite qualification and possessing more than half the service of the petitioner. By Ext.P3, the Government upheld the right of the 7th respondent herein to be appointed as HM with effect from 1.4.2004 and there was a direction to the Manager to appoint her as HM with effect from 1.4.2004 with monetary benefit from the day she joined. Ext.P4 is a consequential communication. Petitioner challenges Ext.P3 and

seeks a declaration that Rule 45 of Chapter XIV A KER is subject to Rule 44, and cannot over-ride the provisional seniority, unless written consent from senior claimant renouncing her claim permanently is obtained.

3. W.P.(C) No.338/07 is filed by the Manager of the School. Therein also, there is a challenge to Ext.P3 Order and the prayers are similar.

4. I heard the learned senior counsel Smt. Sumathi Dandapani, appearing for the petitioner in W.P.(C) No.34551/06 and Shri S. Subhash Chand, learned counsel appearing for the 7th respondent besides the learned Government Pleader. Learned counsel for 7th respondent would point out that the question involved is no longer res integra, and it has engaged the attention of this Court. He relied on the following decisions:

1) Sadanandan v. State of Kerala (2000 (3) KLT 516).

2) Manager, A.M.U.P. School v. State of Kerala (2001 (1) KLT 155).

3) Chandrasekhara Holla v. State of Kerala (2001 (2) KLT 650).

4. Manager, Philipose Mar Dinishus U.P. School v. State of Kerala (2001 (3) KLT SN Case No.31).

5) Prasad v. Philipose Mar Dilshus U.P. School (2005 (3) KLT 487).

6) K. Pushparaj v. K. Manoharan and Others (ILR 2006 KER.1).

7) Sivasankaran v. Manager, K.M.U.P. School and Others (ILR 2006 (3) Ker. 293).

8) Manager, S.N.D.P. LP School v. K.V. Roy and Others (ILR 2006 (4) Ker. 385).

In particular, he would rely on the decision in Prasad v. Philipose Mar Dilshus U.P.School (2005 (3) KLT 487), wherein a Division Bench of this Court held, inter alia, as follows:

> "5. Then, the question is whether the second petitioner of fifth respondent is qualified to be appointed in that vacancy. Admittedly, second petitioner was not a graduate teacher. But the fifth respondent was a graduate teacher with 13 years' teaching experience. It is more than 50% teaching

experience of the second petitioner. This Court has held repeatedly that the word "may" used in R. 45 means "shall" and if there is a graduate teacher with five years' teaching experience and more than 50% service of seniormost of non-graduate teacher, he should be appointed as headmaster. This is so held in *Karunakaran* v. *DEO, Badagara,1976 KLN 51, V. Abdul Rahiman, Manager, AMUPS, Poovambai v. AEO, Balussery & Ors, ILR 1976 (2) Kerala 458, etc.* and those decisions are repeatedly followed. Even though in *Rev. Fr. Daniel* v. *Director of Public Instruction,* 1965 KLT 927, it was held that minority schools are exempted from R.44 and R.45 is only a preferential right and minority management can appoint seniormost qualified UPSA as headmaster notwithstanding availability of graduate teacher for promotion under R.45. But, after the above decision, R.45 was substituted by new R.45 with effect from 9.11.1971. Rr. 44 and 45 should be read together. In Kunjappa v. State of Kerala, 1992 (2) KLT 87, it was held that if there is a graduate teacher with B.Ed. And required number of years of experience as mentioned in R.45, no teacher with SSLC and TTC alone could be appointed as Headmaster. In the

> above circumstances, only fifth respondent was entitled to be appointed in the vacancy that arose on 1.6.1994."

He would, therefore, submit that it is only if there is a tussle between two graduate teachers, the question of invoking Rule 44 which enunciates the doctrine of seniority in the matter of appointment to the post of HM, arises.

5. However, Smt. Sumathi Dandapani, learned counsel for the petitioner in W.P.(C) No. 34551/06 would point out that this is a case where admittedly the petitioner is senior to the 7th respondent as evident from Ext.P2 provisional seniority list. She would submit that Rule 44 unequivocally declares that for appointment to the post of HM, it is the senior who is to be appointed ordinarily. If deviation is to be done, it can be premised only on the basis of written consent from the senior claimant renouncing her claim permanently and the consent is to be approved by the Officer. She would submit that this interpretation is further reinforced by the opening words of Rule 45, as Rule 45 begins with the words "subject to the

provisions of Rule 44". Therefore, she would submit that even in a case where HM has to be appointed under Rule 45, the principle of seniority cannot be given a go-by and as the petitioner is senior to 7th respondent, even if she be a Graduate, petitioner's right derived from the seniority and protected under Rule 44, cannot be taken away. Learned counsel appearing for the Manager also adopts the same arguments. Smt. Sumathi Dandapani would also contend that in the decisions relief on by counsel for 7th respondent, this aspect is not specifically considered.

6. I find myself unable to accept the contentions raised on behalf of the petitioners. No doubt, Rule 44 declares the principle of seniority. Rule 45 appears thereafter and also Rule 45 begins with the words making it unmistakable that it is subject to Rule 44. But, it is to be noted that this is not a case where the petitioner is a Graduate Teacher. It is to be noted that the Division Bench of this Court in Prasad v. Philipose Mar

Dilshus U.P. School (2005 (3) KLT 487) has categorically held that the effect of Rule 44 read with Rule 45 is to be that as long as there is a Graduate Teacher who has the requisite service, no under-graduate teacher can be appointed. In other words, it is a matter which goes to the qualification. The contention based on seniority in the context of Rule 44 would be relevant only if the clash is between two Graduate Teachers in which case, certainly the principle of seniority can legitimately be pressed into service. Equally, the principle of seniority included in Rule 44 springs into existence, if the rivals are under-graduate teachers. Admittedly, it is not the factual situation to be considered in this case, as the petitioner is an under-graduate teacher and her claim is pitted against the 7th respondent who is admittedly a Graduate who has got the requisite service. In such circumstances, I feel that though the petitioner is senior, in the context of Rule 45 and in the teeth of the decision of the Division Bench which I have more elaborately referred to above, I am of the view that neither

prayers in both the Writ Petitions are liable to be granted. There is no merit in the Writ Petitions and they are dismissed.

K. M. JOSEPH, JUDGE

kbk.